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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/897,105	07/03/2001	Hiroyuki Ogawa	SUD-109-DIV	1178

7590

01/06/2003

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EXAMINER

GITOMER, RALPH J

ART UNIT

PAPER NUMBER

1651

DATE MAILED: 01/06/2003

3

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.
09/897,105

Applicant(s)
Ogawa

Examiner
Ralph Gitomer

Art Unit
1651



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on Jul 3, 2001.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 2 is/are pending in the application.
- 4a) Of the above, claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1 and 2 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claims _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
*See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____ 6) ☐ Other:

The preliminary amendment received 7/3/01 has been entered and claims 1-2 are currently pending in this application.

5 The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

10 (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

15 Claim 1 is rejected under 35 U.S.C. 102(b) as being anticipated by Turner.

 Turner (4,945,060) entitled ~~Device~~ Device for Detecting Microorganisms ~~teaches~~ teaches in column 3 lines 4553, a container with an indicator medium sensor is separated from the specimen and its growth medium by a membrane that permits the passage of gas
20 molecules but prevents the passage of ions, to detect microorganisms. In column 4 lines 19-29, the gas permeable, ion impermeable membrane is described. Microbial growth can be detected by detecting carbon dioxide. See the claims.

25 (e) the invention was described in a patent granted on an application for patent by another filed in the United States before the invention thereof by the applicant for patent, or on an international application by another who has fulfilled the requirements of paragraphs (1), (2), and (4) of section 371(c) of this title before the invention thereof by
30 the applicant for patent.

The changes made to 35 U.S.C. 102(e) by the American Inventors Protection Act of 1999 (AIPA) do not apply to the examination of this application as the application being examined
5 was not (1) filed on or after November 29, 2000, or (2) voluntarily published under 35 U.S.C. 122(b). Therefore, this application is examined under 35 U.S.C. 102(e) prior to the amendment by the AIPA (pre-AIPA 35 U.S.C. 102(e)).

10 Claim 1 is rejected under 35 U.S.C. 102(e) as being anticipated by DiGuisseppi.

DiGuisseppi (5,858,769) entitled ~~Device~~ Device for Detecting Microorganisms~~s~~ with a 102(e) date of 5/1989, teaches in column 5 lines 28-43, a sensor with a membrane attached to a support medium inside a container which is sealed. The membrane permits
15 the passage of gas but prevents passage of ions. See the claim.

20 Claim 2 is rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

Claim 2 is directed to identifying the quantities of microorganisms in a sample. This concept is contemplated on page 21 last paragraph. However, how this method would be performed is not set forth and no examples or data of such a determination is found in the specification as originally filed. There are many variables such as culture conditions, the mix of types of microorganisms present, growth stages, the culture medium selected, the pH and temperature, etc., that would have to be accounted for in such a calculation which would not be possible without undue experimentation.

Claims 1 and 2 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Each of the following applies in all occurrences.

The claims must be carefully rewritten in accordance with standard US Patent practice. There are many instances of lack of antecedent basis. In claim 1(a) how the container is prepared and what the container may be is not set forth. ~~Color-turning~~ is queried and is not a term of art. How the indicator would be isolated from the medium after being added to the medium is not seen. In claim 1(c), ~~medium;and~~ may be a typo. Claim 1 lacks a step to determine if a color change occurs.

The title of the invention is not aptly descriptive. A new title is required that is clearly indicative of the invention to which the claims are directed.

5 The Abstract of the Disclosure is objected to because of reference to Figs. Which are not found in the abstract. Correction is required. See M.P.E.P. § 608.01(b).

10 The following prior art pertinent to applicant's disclosure is made of record and not relied upon:

Hannan (4,513,280) teaches CO2 permeable membrane detectors.

Simon (5,494,640) teaches measuring CO2.

Guttag (5,851,611) teaches storage containers.

Toyo (JP 2-154697) teaches detecting microorganisms.

15 Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ralph Gitomer whose telephone number is (703) 308-0732. The examiner can normally be reached on Tuesday-Friday from 8:00 am - 5:00 pm.
20 The examiner can also be reached on alternate Mondays. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Michael Wityshyn can be reached on (703) 308-4743. The fax phone number for this Art Unit is (703) 308-4556. Any inquiry of a general nature or relating to the status
25 of this application should be directed to the Group receptionist

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whose telephone number is (703) 308-1235. For 24 hour access to
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Ralph Gitomer
Primary Examiner
Group 1651

RALPH GITOMER
PRIMARY EXAMINER
GROUP 1200